115-489

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 860.

STEPHEN KURTZ, PLAINTIFF IN ERROR,

vs.

JOHN MAFFITT AND T. W. FIELDS.

IN ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

FILED JUNE 1, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the superior court of the *of the* city and county of San Francisco, State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said superior court before you, between Stephen Kurtz, plaintiff in error, and John Moffitt and T. W. Fields, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at [the] city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that the record and proceedings aforesaid beinspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of May, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and *109*th.

[The seal of the Circuit Court, district of Cal'a.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court, 9th Circuit, District of California.

The above writ of error is hereby allowed.

F. W. LAWLER,
Presiding Judge Superior Court City & County of San Francisco, Cal.

2 *The Answer of the Judges of the Superior Court of the City and County of San Francisco.*

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, contained in a certain schedule to this writ annexed, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within, as within we are commanded.

JAMES J. FLYNN,
Co. Clerk,
By JAS. HIRSCH,
Dep'ty Co. Clerk.

3 *Stipulation.*

Title of Court and Cause.

Stipulated:

Issue and service of citation waived, and defendant in error will enter his appearance in the Supreme Court of the United States.

The defendant in error waives any bond for prosecution of the suit or costs.

ALFRED CLARKE &
A. C. SEARLE,
Attorneys for Defendants in Error.

H. G. SIEBERST &
R. M. SWAIN,
Attorneys for Plaintiff in Error.

4 [Endorsed:] In the superior court, city and county of San Francisco, State of California. Kurtz, plaintiff, *v.* Moffitt *et al.*, defendants. Stipulation.

5 *Petition for Writ.*

In the Superior Court in and for the City & County of San Francisco, State of California.

KURTZ *v.* MOFFITT *et al.*

In the Matter of the Application of STEPHEN KURTZ for a Writ of Habeas Corpus.

To the Hon. T. K. Wilson, judge of the superior court in and for the city and county of San Francisco, State of California:

The petition of Stephen Kurtz, a citizen of Pennsylvania, respectfully shows:

That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by J. Moffitt & T. W. Fields, citizens of California, at the old city hall, in the city and county of San Francisco, in the State of California.

That the said imprisonment, detention, confinement, and restraint are illegal, and that the illegality thereof consists in this, to wit:

That he has been arrested by said persons as a deserter from the U. S. army, and said persons had no warrant or other authority to make such arrest, and said persons are not officers of the United States.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said J. Moffitt & T. W. Fields, commanding them to have the body of petitioner before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of his detention and said writ, and that he may be restored to his liberty.

Dated April 8th, 1885.

STEPHEN KURTZ.

6 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Stephen Kurtz, being duly sworn, says: That he is the petitioner named in the foregoing petition; that he has read the said petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

STEPHEN KURTZ.

Subscribed and sworn to before me, this 8th day of April, 1885.

A. C. BERTHIER,
Dep. Co. Clerk.

[Endorsed:] No. —. Superior court, city & county of S. F'co. In the matter of the application of Stephen Kurtz for a writ of *habeas corpus.* Petition for writ.

7 *Writ of Habeas Corpus.*

In the Superior Court of the City and County of San Francisco, State of California.

The people of the State of California to J. Moffitt & T. W. Fields, Greeting:

We command you that you have the body of Stephen Kurtz, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Stephen Kurtz shall be called or charged, before me, T. K. Wilson, judge of the superior court in and for the city and county of San Francisco, State of California, at the court room of said court, and in the city and county of San Francisco, on the 11th day of April, 1885, at 10 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Stephen Kurtz.

And have you then and there this writ.

Witness Hon. T. K. Wilson, judge of the superior court, at the court room thereof, in the city & county of San Francisco, this 8th day of April, 1885.

Attest my hand the day and year last above written.

T. K. WILSON,
Judge of the Superior Court.

8 Service of the within writ is hereby acknowledged this 8th day of April, 1885.

J. MOFFITT.
T. W. FIELDS.

[Endorsed:] No. —. Superior court, city & county of S. F'co. Kurtz *v.* Moffitt *et al.* In the matter of the application of Stephen Kurtz for a writ of *habeas corpus.* Writ of *habeas corpus.*

9 *Appearance.*

In the Superior Court of the City and County of San Francisco, State of California.

STEPHEN KURTZ, Plaintiff,
v.
J. MOFFITT and T. W. FIELDS, Defendant-.

Now come the said defendants, J. Moffitt and T. W. Fields, and, by their attorney, Alfred Clarke, enters their appearance in said action, and herewith also files *his* petition for the removal of said cause into the circuit court of the United States in and for the ninth circuit, district of California.

ALFRED CLARKE,
Att'y for Defendant-.

10 [Endorsed:] Superior court, city and county of San Francisco. Stephen Kurtz, plaintiff, *v.* J. Moffitt and T. W. Fields, defendants. Appearance.

11 *Petition for Removal.*

In the Superior Court of the City and County of San Francisco, State of California.

STEPHEN KURTZ, Plaintiff,
v.
J. MOFFITT and T. W. FIELDS, Defendants.

Your petitioners, J. Moffitt and T. W. Fields, respectfully show that they are the respondents in the above-entitled suit; that said suit was brought April 8th, 1885, in this court; that it appears from the complaint that the plaintiff, at the time of commencing the said suit, was and still is a citizen of the State of Pennsylvania, and respondents then were and still are citizens of the State of California. Your petitioners represent that the above-entitled suit was brought by said plaintiff to obtain his discharge from the custody of your petitioners, and that it involves a question arising under the Constitution and laws of the United States, to wit, the question whether a person who is not an officer of the United States has authority to arrest a deserter from the army of the United States. Your petitioners show that they have herewith filed their appearance
12 in said action, and offer herewith their bond, executed by Wm. E. Hall and Thomas W. Bethell, as sureties, in the penal sum of $250.00, conditional, as required by law, for their entering in the circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto. Your petitioners pray that said bond be accepted as good and sufficient, according to said statute, and that the said suit may be removed into the next circuit court of the United States in and for said dis-

trict of California, pursuant to said statute in such cases made and provided, and that no further proceedings be had therein in this court.

And your petitioners will ever pray.

ALFRED CLARKE,
Att'y for Petitioners.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

J. Moffitt and T. W. Fields, being first duly sworn, say: That they are the petitioners above named; that they have read the foregoing petition and know the contents thereof, and that each and every of the matters and things therein stated are true.

T. W. FIELDS.
JOHN MOFFITT.

Subscribed and sworn to before me, this 9th day of April, A. D. 1885.

JAS. HIRSCH,
Deputy Co. Clerk.

13 [Endorsed:] In the superior court of the city and county of San Francisco. Stephen Kurtz, plaintiff, *vs.* J. Moffitt and T. W. Fields, defendants. Petition for removal.

14 *Bond.*

Know all men by these presents, that J. Moffitt and Thos. W. Fields, as principals, and Thomas W. Bethell and Wm. E. Hall, both of the city and county of San Francisco, as sureties, are held and firmly bound unto Stephen Kurtz in the penal sum of two hundred and fifty dollars of the United States of America, to be paid to the said Stephen Kurtz, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated the ninth day of April, one thousand eight hundred and eighty-five.

The condition of the above obligation is such that if said J. Moffitt and T. W. Fields shall enter and file, or cause to be entered and filed, in the circuit court of the United States in and for the district of California, on the first day of its session next to be held, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the superior court of the county of San Francisco, State of California, in which Stephen Kurtz is plaintiff and J. Moffitt and T. W. Fields are defendants, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation shall be void; otherwise of force.

Signed, sealed, and delivered in the presence of—
THOS. W. BETHELL.
WM. E. HALL.

T. W. FIELDS. [SEAL.]
JOHN MOFFITT. [SEAL.]

15 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

Thos. W. Bethell and Wm. E. Hall, being duly sworn, each for himself deposes and says: That he is a resident of the city and county of San Francisco, State of California, and a freeholder in said State of California, and that he is worth the sum of two hundred and fifty dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

WM. E. HALL.
THOS. W. BETHELL.

Subscribed and sworn to before me this 9th day of April, 1885.
JOS. HIRSCH,
Deputy Clerk of the Superior Court of the City and County of San Francisco.

The within bond is hereby approved.

WILSON, *Judge.*

16 [Endorsed:] In the superior court of the city and county of San Francisco. J. Moffitt and T. W. Fields to Stephen Kurtz. Bond. Dated April 9th, 1885.

17 *Order of Removal.*

Title of Court and Cause.

Upon reading and filings the petition of J. Moffitt and T. W. Fields, the defendants in the above-entitled action, and upon filing the bond, and good and sufficient sureties having been offered by the said defendants in the premises, and the same being by me, the judge of said superior court, duly accepted, it is hereby ordered that no further proceedings be had in this cause, and the removal of the same to the circuit court of the United States for the district of California, to be held in and for the 9th district of California, be, and the same is hereby, allowed and ordered in accordance with the aforesaid petition and the statute of the United States in such case made and provided.

WILSON, *Judge.*

18 [Endorsed:] Superior court, city and county of San Francisco. Stephen Kurtz, plaintiff, *v.* J. Moffitt and T. W. Fields, defendants. Order of removal. Filed Apr. 11, 1885. Jas. J. Flynn, clerk, by E. W. O'Connor, deputy clerk.

19 *Bill of Exceptions.*

Title of Court and Cause.

Now come the defendants and move the court to dismiss this proceeding on the following ground: This court having, on the 11th day of April, 1885, granted defendants' motion to remove this proceeding, and a copy of the record herein having been filed in the

circuit court of the United States for the district of California, and said circuit court having, on the 21st day of April, 1885, remanded the case to this court, this court has no jurisdiction to proceed in this matter.

The court denied the motion; to which ruling and order the defendants then and there duly excepted. Defendants specify the error on which they rely, that the court erred in matter of law in making the ruling and order excepted to.

As evidence of which this bill of exceptions is rendered and signed, the same being correct.

April 25th, 1885.

T. K. WILSON, *Judge.*

20 [Endorsed:] Superior court, city and county of San Francisco. Kurtz, plaintiff, *v.* Moffitt *et al.*, defendant-. Bill of exceptions. Filed Apr. 25, 1885. James J. Flynn, clerk, by E. W. O'Connor, deputy clerk.

21 *Return to Writ.*

Title of Court and Cause.

Now come the respondents and make this their return to the writ of *habeas corpus* herein, and shows that respondent, J. Moffit, is a regular police officer of the city and county of San Francisco, and respondent, T. W. Fields, is a special police officer of said city and county, and being such officers as aforesaid, they arrested the petitioner, Stephen Kurtz, in the city and county of San Francisco by the authority of the United States, in this, to wit: That said Stephen Kurtz, under the name of Stephen Noll, on the 29th day of May, 1876, at Cleveland, in the State of Ohio, enlisted in the army of the United States for the term of five years, and on the 17th day of March, 1879, he being a soldier attached to Co. D of the 21st Regiment of Infantry of the army of the United States, stationed at Vancouver Barracks, in the Territory of Washington, deserted from the army of the United States, and your respondents hold said
22 petitioner for the purpose of delivering him to the military authorities of the United States, to be tried according to the laws of the United States.

Respectfully submitted.

JOHN MOFFITT.
T. W. FIELDS.

Subscribed and sworn to before me, this 25th day of April, A. D. 1885.

JOS. HIRSCH,
Deputy Co. Clerk.

23 [Endorsed:] In the superior court of the city & county of San Francisco. Kurtz *vs.* Moffitt *et al.* Return to writ of *habeas corpus.* Filed Apr. 25, 1885. Jas. J. Flynn, clerk, by E. W. O'Connor, deputy clerk.

24 *Suggestions of Plaintiff against the Writ.*

In the Superior Court of the City and County of San Francisco, State of California.

STEPHEN KURTZ, Plaintiff,
vs.
J. MOFFITT & T. W. FIELDS, Defendants.

Suggestions against the return.

Now comes the plaintiff and suggests that the return is insufficient to authorize the detention of the plaintiff, for the reasons following:

First.

It appears by said return that the defendants were not officers of the United States, but are police officers of the municipality of San Francisco, and as such they have no authority to arrest or detain plaintiff, and as such officers they have been and are prohibited from arresting or detaining plaintiff as a deserter from the United States army by a rule of the police department which was in force at the time of the arrest of plaintiff, and still is in force, which rule was, and is, as follows:

25 "Police officers are prohibited from arresting deserters from the United States army or navy without a warrant."

Second.

The desertion set up in the return is an offense against the United States, and not against the State of California, of which Commonwealth the defendants are officers, and they are therefore incompetent to arrest or detain the plaintiff.

Third.

The desertion set up in the return is barred by article 103 of section 1342 of the Revised Statutes of the United States.

Wherefore plaintiff prays for his discharge.

STEPHEN KURTZ.

Subscribed and sworn to before me, this 25th day of April, A. D. 1885.

E. BURKE,
Justice of the Peace.

26 [Endorsed:] In the superior court of the city and county of San Francisco, State of California. Kurtz *vs.* Moffitt *et al.* Suggestions of plaintiff against the writ of *habeas corpus.* Filed Apr. 25, 1885. Jas. J. Flynn, clerk, by E. W. O'Connor, deputy clerk.

27 *Extract from Minutes of Court.*

Title of Court and Cause.

Extract from minutes of court, page 76, vol. 2, May 8th, 1885.

This cause coming on regularly to be heard this day, whereupon,

after argument of respective counsel, it is by the court ordered that writ be dismissed and the defendant remanded to custody.

28 [Endorsed:] In the superior court, city and county of San Francisco, State of California. Kurtz, plaintiff, *v.* Moffitt *et al.*, defendants. Extract from minutes of court.

29 *Assignment of Error and Prayer for Reversal.*

In the Supreme Court of the United States.

Title of Court and Cause.

To the Honorable the Supreme Court of the United States:

The plaintiff in error specifies the errors of which he complains:

1st. The court erred in deciding that desertion is a crime.

2nd. The court erred in deciding against plaintiff upon his plea of the statute of limitation.

3rd. The court erred in deciding that defendants had any right, power, or authority to arrest plaintiff.

4th. The court erred in deciding that desertion was a continuous offense, and of the grade of infamous or felonious crime.

5th. The court erred in deciding that no special warrant was required to authorize the arrest of plaintiff.

Therefore the judgment should have been for the discharge of the plaintiff in error.

30 Wherefore plaintiff prays that the decision complained of be reversed, and that he have such relief as may be proper in the premises.

H. G. SIEBERST & R. M. SWAIN,
Attorneys for Plaintiff in Error.

The defendant- in error specifies the error of which he complains:

The court erred in denying defendants' motion to dismiss the case (see bill of exceptions, folio 19, of record), because the cause was properly removed to the circuit court and improperly remanded by the circuit court to the superior court, and the superior court had no jurisdiction to proceed to hear the case on the merits. The superior court acquired no jurisdiction by the remand of the case.

Wherefore defendants pray that the superior court be directed to dismiss the case on the ground that it has no jurisdiction.

ALFRED CLARKE & A. C. SEARLE,
Attorneys for Defendants in Error.

31 [Endorsed:] In the superior court, city & county of San Francisco, State of California. Kurtz, plaintiff, *v.* Moffitt *et al.*, defendants. Assignment of error and prayer for reversal.

32 Title of Court and Cause.

I, James J. Flynn, clerk of the superior court of the city and county of San Francisco, State of California, do hereby certify that the foregoing 31 pages, written pages, numbered from 1 to 31, both

24 *Suggestions of Plaintiff against the Writ.*

In the Superior Court of the City and County of San Francisco, State of California.

STEPHEN KURTZ, Plaintiff,
vs.
J. MOFFITT & T. W. FIELDS, Defendants.

Suggestions against the return.

Now comes the plaintiff and suggests that the return is insufficient to authorize the detention of the plaintiff, for the reasons following:

First.

It appears by said return that the defendants were not officers of the United States, but are police officers of the municipality of San Francisco, and as such they have no authority to arrest or detain plaintiff, and as such officers they have been and are prohibited from arresting or detaining plaintiff as a deserter from the United States army by a rule of the police department which was in force at the time of the arrest of plaintiff, and still is in force, which rule was, and is, as follows:

25 "Police officers are prohibited from arresting deserters from the United States army or navy without a warrant."

Second.

The desertion set up in the return is an offense against the United States, and not against the State of California, of which Commonwealth the defendants are officers, and they are therefore incompetent to arrest or detain the plaintiff.

Third.

The desertion set up in the return is barred by article 103 of section 1342 of the Revised Statutes of the United States.

Wherefore plaintiff prays for his discharge.

STEPHEN KURTZ.

Subscribed and sworn to before me, this 25th day of April, A. D. 1885.

E. BURKE,
Justice of the Peace.

26 [Endorsed:] In the superior court of the city and county of San Francisco, State of California. Kurtz *vs.* Moffitt *et al.* Suggestions of plaintiff against the writ of *habeas corpus.* Filed Apr. 25, 1885. Jas. J. Flynn, clerk, by E. W. O'Connor, deputy clerk.

27 *Extract from Minutes of Court.*

Title of Court and Cause.

Extract from minutes of court, page 76, vol. 2, May 8th, 1885.

This cause coming on regularly to be heard this day, whereupon,

after argument of respective counsel, it is by the court ordered that writ be dismissed and the defendant remanded to custody.

28 [Endorsed:] In the superior court, city and county of San Francisco, State of California. Kurtz, plaintiff, *v.* Moffitt *et al.*, defendants. Extract from minutes of court.

29 *Assignment of Error and Prayer for Reversal.*

In the Supreme Court of the United States.

Title of Court and Cause.

To the Honorable the Supreme Court of the United States:

The plaintiff in error specifies the errors of which he complains:

1st. The court erred in deciding that desertion is a crime.

2nd. The court erred in deciding against plaintiff upon his plea of the statute of limitation.

3rd. The court erred in deciding that defendants had any right, power, or authority to arrest plaintiff.

4th. The court erred in deciding that desertion was a continuous offense, and of the grade of infamous or felonious crime.

5th. The court erred in deciding that no special warrant was required to authorize the arrest of plaintiff.

Therefore the judgment should have been for the discharge of the plaintiff in error.

30 Wherefore plaintiff prays that the decision complained of be reversed, and that he have such relief as may be proper in the premises.

H. G. SIEBERST & R. M. SWAIN,
Attorneys for Plaintiff in Error.

The defendant- in error specifies the error of which he complains:

The court erred in denying defendants' motion to dismiss the case (see bill of exceptions, folio 19, of record), because the cause was properly removed to the circuit court and improperly remanded by the circuit court to the superior court, and the superior court had no jurisdiction to proceed to hear the case on the merits. The superior court acquired no jurisdiction by the remand of the case.

Wherefore defendants pray that the superior court be directed to dismiss the case on the ground that it has no jurisdiction.

ALFRED CLARKE & A. C. SEARLE,
Attorneys for Defendants in Error.

31 [Endorsed:] In the superior court, city & county of San Francisco, State of California. Kurtz, plaintiff, *v.* Moffitt *et al.*, defendants. Assignment of error and prayer for reversal.

32 Title of Court and Cause.

I, James J. Flynn, clerk of the superior court of the city and county of San Francisco, State of California, do hereby certify that the foregoing 31 pages, written pages, numbered from 1 to 31, both

inclusive, are a true copy of the record and of all the proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error, and pages 29 and 30, hereto annexed, are a true copy of the assignments of error in said cause.

Witness my hand and seal of the court, this —— day of May, A. D. 1885.

[Seal of Superior Court, city & county of San Francisco, Cal.]

JAMES J. FLYNN, *Clerk*,
By JOS. HIRSCH, *Deputy Clerk*.

33 [Endorsed:] In the superior court, city and county of San Francisco, State of California. Kurtz, plaintiff, *vs.* Moffitt *et al.*, defendants.

34 [Endorsed:] No. —. In Supreme Court of the United States. S. Kurtz, plaintiff in error, *v.* J. Moffitt and T. W. Fields, defendants in error. H. G. Sieberst and R. M. Swain, attorneys for pl'ff in error. Alfred Clarke and A. C. Searle, attorneys for def'ts in error. Address room 2, old City Hall, San Francisco.

Endorsed on cover: California superior court, city & county of San Francisco. No. 860. Stephen Kurtz, plaintiff in error, *vs.* John Moffitt and T. W. Fields. Filed June 1, 1885.